



November 29, 2001

Ms. Katherine Cahill
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2001-5543

Dear Ms. Cahill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155460.

The San Antonio Water System ("SAWS") received a request for:

- 1) SAWS' contract with HDR or HDR Simpson for inspection services relative to the referenced project;
- 2) Any and all insurance certificates HDR furnished to SAWS;
- 3) The Quality Assurance Program in effect between SAWS and Astro;
- 4) All Daily Reports generated while Astro was on the job;
- 5) All reports of any period having to do with inspection or approval of Astro's work; and
- 6) The certified payrolls for KGME's project known as the Olmos Basin Golf Course Recycled Water Project.

You indicate that you do not have information responsive to the second category of information. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio

1978, writ dismiss'd); Open Records Decision No. 452 at 3 (1986). You claim that information responsive to the remainder of the categories of the request is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative samples of information.¹

We begin by noting that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body

Gov't Code § 552.022(a)(1), (3). Thus, the contracts involving the expenditure of public funds and the completed reports in the submitted information must be released unless they are excepted from disclosure under section 552.108 or they are confidential under other law. You do not contend that any of the submitted information is excepted from disclosure under section 552.108. Furthermore, section 552.103 of the Government Code is a discretionary exception and is not other law for the purpose of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103). Therefore, we find that you must release the contracts and the completed reports in the submitted information under section 552.022.

With respect to the remainder of the submitted information, we address your argument under section 552.103 of the Government Code. Section 552.103 provides as follows:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

SAWS has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). SAWS must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You contend that SAWS has received three letters from the attorneys for Travelers Casualty and Surety Company ("Travelers") indicating that litigation is reasonably anticipated. According to you, SAWS had contracted with Astro Quality Services, Inc. ("Astro") for a

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

construction project. Astro filed bankruptcy and Astro's surety, Travelers, executed a takeover agreement. Subsequently, Travelers' attorney sent SAWS a letter indicating that "SAWS materially increased the risk for Travelers in its suretyship obligation by failing to inspect as required by the contract documents, before allowing the pipe trenches to be back filled." Several months later, you indicate that the same attorney wrote to SAWS indicating that Travelers was willing to meet with SAWS before a decision was made "to abandon the work on the basis of a breach of the duties owed a surety." The attorney subsequently sent another letter to SAWS indicating that SAWS had ignored its inspection responsibilities and that Travelers had been discharged under its performance bond. Although this correspondence clearly indicates that Travelers believes SAWS did not fulfill its duties of inspection, and consequently, Travelers has been discharged of its duties as a surety, you have provided us with no concrete evidence that either Travelers or SAWS has threatened litigation or taken steps toward filing a lawsuit over this matter. Therefore, we find that none of the submitted information is excepted from disclosure under section 552.103, and all of the information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 155460

Enc: Submitted documents

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